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NO. 80-2146

in the Supreme Court of the United States

OCTOBER TERM, 1981

STATE OF FLORIDA,

Petitioner,

vs.

MARK ROYER,

Respondent.

On Writ of Certiorari to the
District Court of Appeal of Florida,
Third District

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

The Respondent believes that the phraseology of the question presented by the Petitioner inaccurately depicts the holding of the unanimous en banc Florida District Court of Appeal decision. Based upon the decision appealed from, Respondent submits that the following question is the proper one presented to this Court by the decision the Petitioner seeks to have reviewed:

I.

WHETHER THE DECISION OF A UNANIMOUS EN BANC FLORIDA APPELLATE COURT BASED ON THE FLORIDA CONSTITUTION AND THE FOURTH AMENDMENT PROPERLY SUPPRESSED CONTRABAND SEIZED BY NARCOTICS OFFICERS BASED ON THE FOLLOWING FINDINGS:

A) RESPONDENT WAS INVOLUNTARILY CONFINED ("IN CUSTODY") WITHOUT PROBABLE CAUSE WHERE HE 1) WAS INFORMED HE WAS SUSPECTED OF TRANSPORTING NARCOTICS, 2) HIS AIRLINE TICKET AND LUGGAGE WERE TAKEN FROM HIM BY THE OFFICERS AND NEVER OFFERED OR RETURNED TO HIM, AND 3) WAS ASKED TO ACCOMPANY TWO AIRPORT NARCOTICS OFFICERS TO A SMALL OFFICE WHERE THE SEARCH WAS CONDUCTED.

B) THE "DRUG COURIER PROFILE" USED BY NARCOTICS OFFICERS IN THE INSTANT CASE DOES NOT CONSTITUTE PROBABLE CAUSE TO ARREST OR CONFINE RESPONDENT.

C) RESPONDENT'S ALLEGED "CONSENT" GIVEN AFTER UNLAWFUL CONFINEMENT WAS INVOLUNTARY AND INVALID.

D) UNLESS THERE IS PROBABLE CAUSE, EXIGENT CIRCUMSTANCES CANNOT SERVE TO "EXCUSE" A SEARCH WARRANT.

II.

WHETHER THE STATE TIMELY RAISED ITS CLAIM FOR A GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE AND WHETHER SUCH AN EXCEPTION IS PERMISSIBLE UNDER THE INSTANT FACTS OR UNDER ANY FACTS.

III.

WHETHER THE FLORIDA APPELLATE COURT PROPERLY SUPPRESSED THE CONTRABAND IN ACCORDANCE WITH FLORIDA'S CONSTITUTIONALLY INCORPORATED EXCLUSIONARY RULE EVEN IF THIS COURT WERE TO DETERMINE THAT THE CONTRABAND WAS NOT SEIZED IN VIOLATION OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

IV.

WHETHER THE INSTANT APPEAL IS MOOT DUE TO THE STATE'S FAILURE TO SECURE A STAY OF THE FLORIDA APPELLATE COURT'S DECISION AND OF THE ORDER OF DISCHARGE WHICH FREED THE RESPONDENT PURSUANT TO THE MANDATE OF THE FLORIDA APPELLATE COURT'S DECISION.

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PREFACE

The parties will be referred to as follows:

1. Petitioner, The State of Florida, as "Petitioner" or the "State."

2. The Respondent, Mark Royer, as the "Respondent."

3. The United States, Amicus Curiae, as the "United States."

The record is to be referred to as follows:

(A) Joint Appendix

(RA) Respondent's Appendix, incorporated herein.

STATEMENT OF THE CASE

Public Safety Department Officers Johnson and Magdalena were assigned to Miami International Airport on January 3, 1978 and sometime between 12:00 and 12:30 p.m., they encountered the Respondent. (A. 25.) Although neither officer had received any prior information linking the Respondent to criminal activity, their suspicions were aroused by certain observations. (A. 28.) Officer Johnson testified that he and Magdalena were watching Respondent carefully and suspected him of drug trafficking due to his age, nervousness, his two American Tourister suitcases, and the fact that he was looking around continually and watching his bags carefully. (A. 27-35.) Another factor deemed significant by the policemen in regard to Respondent's actions is that he paid for his airline ticket in cash. (A. 35, 36.)

After Respondent bought his ticket, he was given two stick-on adhesive labels for his baggage which had the name "Holt" written on each, the same name in which the ticket reservation was made and in which the ticket was written. (A. 37, 38, 43.) As Respondent left the ticket counter and proceeded to the departure gate for National Airlines, he was stopped by Officers Johnson and Magdalena. (A. 39, 40.) The policemen identified themselves and showed Respondent their badges and identification cards. (A. 40.) Johnson asked Respondent to show him his airline ticket and identification. (A. 41.) After giving the policeman his airline ticket, it was never returned or offered back to Respondent until *after* the subsequent search occurred. (A. 69, 71, 80.) Respondent produced a New Jersey driver's license in the name of Mark Royer and explained

that a friend had made reservations for him in the name of "Holt." (A. 42, 43.)

The officers told Respondent that they were narcotics investigators and that they had reason to suspect that he was transporting narcotics. (A. 44, 70.) The policemen had Respondent accompany them to an interrogation room some forty feet from the point of their encounter. (A. 44, 45.) The room was actually no more than a converted closet fitted with a small desk and two chairs. (A. 45.) Respondent testified that on the way to the room one officer said that the policemen had been waiting for him all morning and wanted to know how much pot was in the bags. Respondent was told that he was crazy to try to do this since there were always guards around. (A. 84.) The officers did not refute Respondent's testimony.

After Respondent reached the police room, Magdalena remained with him as Johnson tore off the baggage stubs from Respondent's ticket and without permission from Respondent, went downstairs to get the bags. (A. 65, 66, 67, 69, 70, 83.) No Miranda warnings had been given nor had the Respondent formally been placed under arrest at this point. (A. 68, 69.) After Johnson returned with the suitcases, of which he took possession without requesting the Respondent's consent, he joined Respondent and Magdalena in the interrogation room. (A. 70.)

Respondent testified that he was asked to empty his pockets and that among the items he took from his pockets was a luggage key. (A. 85, 86.) Officer Johnson stated that upon entering the police room, Respondent was asked if he would give consent to a search of his

suitcases so that the policemen could confirm their suspicions that he was carrying narcotics. (A. 47.) Respondent stated that consent was never specifically asked for and that after he was told to unlock one suitcase and did so, one of the officers opened it. (A. 85, 86.) There is undisputed testimony to the effect that Respondent was never told he had a right to disobey the requests of the policemen or that he had a right to leave or refuse to allow the search. (A. 64, 70, 72, 86, 87.) Respondent testified that he did not believe he was free to leave at any time during this encounter. (A. 80, 81, 82.)

Officer Johnson stated that in response to his request for consent, Respondent did not say anything. (A. 48.) Respondent silently produced the key to the white suitcase which was subsequently opened by officer Johnson. (A. 48.) The second suitcase, the gray one, had a combination lock which Respondent was unable to open. (A. 48.) After Johnson obtained a screwdriver, the gray suitcase was pried open with no apparent objection from Respondent. (A. 48, 49.) After viewing the contents of the suitcases, Respondent was placed under arrrest and read his Miranda rights. (A. 53.)

Respondent filed a Motion to Suppress in the Trial Court which was denied (A. 4-10). Respondent filed a Notice of Appeal to the District Court of Appeals, Third District of Florida. (A. 117). On December 28, 1979, the Appellate Court affirmed the Trial Court in a split decision. 389 So.2d 1007-1015. Respondent's Motion For Rehearing En Banc was granted and on September 9, 1980, the District Court of Appeals for the Third District of Florida rendered a unanimous decision reversing the Trial Court's decision. 389 So.2d 1007

(the two affirming judges on the original panel were not in regular service and did not sit on the en banc court).

The unanimous en banc Florida Appellate Court used a three-step analysis of the facts involved in the case in order to reverse the denial of Respondent's Motion to Suppress and in order to reject the State's primary argument for affirmance, that Respondent effectively and validly consented to the opening of his suitcases. The Appellate Court found that (1) the Respondent was involuntarily confined due to his being informed that he was suspected of transporting narcotics, the taking of his ticket and luggage without returning them to him, and the Respondent's inability to leave the interrogation room. The Court stated that the case presented an "almost classic definition of imprisonment." 389 So.2d at 1018. The Court also found that (2) no probable cause existed since compliance with a drug courier profile does not amount to probable cause. Finally, the Court found (3) the consent was tainted and invalid since any consent given under such circumstances must be deemed involuntary and thus invalid as a matter of law.

The Florida Appellate Court also dealt with the State's contention that exigent circumstances excused the actions of the police officers in the instant case. The Court stated as follows:

> We do not decide whether "exigent circumstances" are involved in departing airline passenger cases like this one because, even if they exist, such circumstances serve only to "excuse" the absence of a warrant. They do

not take the place of probable cause necessary to sustain any search of the kind involved in this case, whether made with a warrant or without one. (citations excluded).

389 So.2d at 1016-1017

After the State's Motion for Stay was denied, the mandate issued. Subsequent to the mandate, and upon motion of the Respondent, the trial court ordered the discharge of the Respondent. (R.A. 1). No appeal was taken from either the denial of the Motion for Stay or the order discharging the Respondent.

SUMMARY OF ARGUMENT

The actions of the narcotics officers in "stopping" the Respondent, at which time identification was requested and investigation commenced, was violative of the Fourth Amendment under *Reid v. Georgia*, 448 U.S. 438, (1980), since there existed no reasonable suspicion that the Respondent was engaging in criminal activity. The Respondent was detained soley upon the observations of the narcotics officers who claimed that the Respondent met certain characteristics set forth in the so-called "drug courier profile." Such compliance describes a large category of presumable innocent travelers and is insufficient to justify the initial seizure of the Respondent under *Reid v. Georgia*.

The drug courier profile has extremely limited usefulness, if any, but in no case should be used to warrant more than a mere contact based upon unfounded suspicion. Mere compliance with a handful of "average" physical characteristics associated with arrested drug

couriers is clearly not sufficient for establishing probable cause to arrest an individual. As this Court ruled in *Reid v. Georgia*, such characteristics completely consistent with innocent behavior are also insufficient for establishing reasonable suspicion. Therefore, if this Court approves the use of the profile in any manner it should be limited to establishing a basis for mere contact only.

The actions of the police officers sufficiently restrained the freedom of the Respondent to amount to an arrest, absent probable cause. The officers told the Respondent he was suspected of transporting narcotics; they took his ticket and baggage stubs and never returned them to him. Additionally, the narcotics officers took the Respondent, who neither had possession of his ticket or bags, for further questioning and a search to a small interrogation room. Upon the occurrence of any one of these circumstances, a reasonable person would objectively conclude that he was not free to leave and, as a result, an arrest occurred. The narcotics officers had no probable cause to arrest the Respondent and one of the officers admitted as such at trial. The Respondent did not give a free, voluntary and unequivocable consent to the search and, any alleged consent is presumed invalid as the product of the illegal arrest.

The State failed to timely preserve its argument regarding a good faith exception to the exclusionary rule, and such an exception should not be applied in this case or any other case. Section 1 of Petitioner's Brief, regarding its attempt to carve out a good faith exception to the exclusionary rule, was never raised below and cannot be validly challenged in this Court. Additionally, the instant case does not involve the

retroactive invalidity of a statute or warrant, nor does it involve a judgmental error where a police officer actually believed he had probable cause to act as he did. The officer involved in the case at bar admitted at the hearing on the Respondent's Motion to Suppress that he had no probable cause prior to the search of the baggage. Finally, a good faith exception to the exclusionary rule is not necessary at this point and should not be promulgated by the Court.

The Florida Constitution includes an express exclusionary rule which affords more protection to the people of the State of Florida than does the Fourth Amendment to the United States Constitution. Therefore, even if this Court were to modify the federal exclusionary rule so as to admit the evidence in question into evidence, the Florida Supreme Court would still be constitutionally obligated under Florida's exclusionary rule to suppress the evidence.

Subsequent to the mandate of the District Court of Appeals of the Third District of Florida, the Respondent was lawfully discharged. (R.A. 1). The State failed to appeal the Order of Discharge and, as a result, the Respondent's freedom has been restored and a second prosecution for the same offense would be barred. Additionally, the failure of the Petitioner to secure a stay of the appellate decision or an appeal of the Order of Discharge renders the instant appeal moot.

ARGUMENT

I.

THE NARCOTICS OFFICERS' INITIAL "STOP" OF RESPONDENT WAS VIOLATIVE OF THE FOURTH AMENDMENT UNDER *REID v. GEORGIA* SINCE THERE EXISTED NO REASONABLE SUSPICION THAT RESPONDENT WAS ENGAGING IN CRIMINAL ACTIVITY.

A. The initial actions of the narcotics officers resulted in at least an illegal investigative detention where the alleged "reasonable suspicion" was no more than partial compliance by the Respondent with a drug courier profile.

The initial "stop" of the Respondent at which time identification was requested and investigation commenced was based entirely upon the narcotics officers' observations that the Respondent met certain characteristics set forth in the so-called "drug courier profile." As this Court ruled in *Reid v. Georgia*, 448 U.S. 438 (1980), compliance with a drug courier profile, describing a large category of presumably innocent travelers, is an insufficient foundation to justify even the initial detention and investigation of the Respondent by the narcotics officers. *Reid* held:

> Although there could, of course, be circumstances in which wholly lawful conduct might justify the suspicion that criminal activity was afoot, see *Terry v. Ohio*, supra at 27-28, 20 L ED 2d

889, 88 S Ct 1868, 44 Ohio Ops 3rd 383, this is not such a case.

448 U.S. at 441.

The Respondent submits that the indicia of the drug courier profile relied upon by the narcotics officers in the instant case are characteristic of wholly innocent behavior and do not justify the initial stop and conversation by the officers with the Respondent.

The Respondent does not contend that the narcotics officers could not have confronted the Respondent in any manner without an articulable suspicion; rather it is the type and manner of the initial confrontation which is prohibited by the Fourth Amedment. As Justice White stated in the concurring opinion in *Terry v. Ohio*, 392 U.S. 1, 34 (1968), "[t]here is nothing in the Constitution to prevent a policeman from addressing questions to anyone on the streets." Although a police officer can "address questions" to any individual, the individual cannot be stopped, nor can the individual even be required to answer such questions. In fact, he can ignore the officer and walk away. However, an investigative stop such as the one which occurred in the instant case must be based on a reasonable suspicion that the person is involved in criminal activity, and such reasonable suspicion must stem from specific articulable facts. *Reid v. Georgia*, 448 U.S. 438 (1980). In striking down random vehicle stops in *Delaware v. Prouse*, 440 U.S. 648 (1979), this Court held that even a license and registration check require an articulable and reasonable suspicion that a law is being violated. Additionally, this Court found that a Texas statute allowing an officer to detain an individual and require the individual to identify himself

was unconstitutional because reasonable suspicion of criminal conduct was not required by the statute. *Brown v. Texas*, 443 U.S. 47 (1979).

In the instant case, the narcotics officers did not merely "address questions" to the Respondent which the Respondent could have ignored without stopping. After identifying themselves as narcotics officers, one of the officers stated that he "had reason to suspect he [Respondent] was transporting narcotics." (A. 44). Although it is certainly arguable that even at this point an unlimited detention or arrest occurred, such a warning and conversation amounted to at least a brief seizure or investigative detention. The Respondent submits that the officers did not have reasonable suspicions for an investigative stop, and certainly had no probable cause for an unlimited detention or an arrest. In addition to telling the Respondent that he was suspected of transporting narcotics, the officers took both the Respondent's baggage stubs and ticket without returning them to him. (A. 55, 58, 65, 71, 79). Respondent submits that such actions actually constituted an arrest (see Point II), but in no way can they be seen as less than a *Terry* stop and seizure. The questioning of the Respondent alone is at least comparable to the license and registration check in *Delaware v. Prouse*, *supra*, and the request for identification in *Brown*, both held to require an articulable and reasonable suspicion that the individual being detained had violated a law.

The basis for the initial confrontation and stop by the narcotics officers with the Respondent was simply insufficient to constitute the articulable suspicion required to constitute a stop under *Terry v. Ohio*, 392 U.S. 1 (1968). As stated in *Reid*, manifestation of a few of the

drug courier profile characteristics, without more, does not support a finding of reasonable suspicion. *Accord, United States v. Morin*, 665 F.2d 765 (5th Cir. 1982).

Although neither officer had received any prior information linking the Respondent to criminal activity, their suspicions were aroused by certain observations. (A. 28). Officer Johnson testified that he and Officer Magdelena were watching the Respondent carefully and suspected him of drug trafficking due to (1) his age, (2) his nervousness, (3) his use of American Tourister suitcases[1] and (4) the fact that he had paid for his airline ticket in cash. (A. 27-36). As a matter of law, such observations are insufficient to warrant the narcotics officer stopping the Respondent. These alleged "drug courier profile characteristics" are similar to those relied upon by the agent in *Reid* where the Court held that:

> . . . [these] circumstances describe a very large category of presumably *innocent travelers* who *would be subject to virtually random seizures* were the Court to conclude that as little foundation as there was in this case could justify a seizure. (emphasis added).
>
> 448 U.S. at 441.

The profile characteristics relied upon by the narcotics officers in the instant case are quite analagous to those followed by the DEA agent in the *Reid* case; and in neither case were they sufficient to justify an investigative stop. In *Reid*, the DEA agent confronted

[1]The officer testified that ". . . American Tourister suitcases seemed to be standard issue for marijuana smuggling." (A. 29).

the defendant because (1) the defendant had arrived from a "source city," (2) the defendant arrived in the early morning, (3) the defendant and his companion appeared to be concealing the fact that they were traveling together, and (4) the defendant and his companion had no luggage other than shoulder bags. 448 U.S. at 441. Clearly, the Respondent's age, nervousness, and use of American Tourister luggage was no more suspicious than those characteristics dismissed by this Court in *Reid* as being "too slender a reed to support the seizure in this case." *Id.* The additional fact that the Respondent paid for his ticket in cash adds no more credence to the officers' conduct or alleged suspicions.[2]

The instant case is more analagous to the situation in *Sibron v. New York*, 392 U.S. 40 (1968), where the seizure was held to be illegal, than that of *Terry*, in which the Court held that the officers' actions were justified. In *Terry*, the Court found that the stop and pat down of the defendant's clothing was proper and indeed good police work. However, in the companion case of *Sibron*, the Court held that the police officer did not have sufficient basis for a search of the defendant where the officer relied merely on certain conversations with drug addicts and a conversation with the defendant prior to the search.

Like *Sibron*, the instant case involves a narcotics search and, unlike *Terry*, the stop of the Respondent

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[2]Although the Respondent did not remember exactly how much he paid for his one-way ticket, fares from Miami to New York City during this time ranged from $50 to $100. Surely the cash payment of such a relatively small sum is hardly a suspicious circumstance.

did not involve a weapons search. Professor LaFave maintains that the seriousness of the crime suspected in *Terry*, armed robbery, versus a narcotics offense in *Sibron* may have been one of the reasons for the different results. *See* 3 W. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* §9.1, at 14 n. 51 (1978). Another writer, Professor Whitebread, argued that the motive of the officer in *Terry* in searching for a weapon as opposed to the officer in *Sibron*, who was merely looking for an object not dangerous to the officer is another important distinguishing factor. C. Whitebread, *Criminal Procedure: An Analysis of Constitutional Cases Concepts* 175 (1980). *See also* Gaswirth, *Reformulating Seizures—Airport Drug Stops and the Fourth Amendment*, 69 CALIF. L. REV. 1486, 1494-1495 n. 7 (1981). Unlike *Terry*, the case at bar did not involve a violent crime such as armed robbery, and like *Sibron* it did not involve a weapons search by police officers.

In both *Reid* and the instant case, wholly innocent behavior, characterizing a great many airport travelers, were improperly relied upon to justify an investigative detention of a suspect. Although it is clear that police may detain a person for investigative purposes not amounting to an arrest on the basis of reasonable suspicions that he is engaged in criminal activity, the activities of the Respondent in the instant case simply do not meet that threshold. As a result, the initial detention by the narcotics officers was a violation of the Fourth Amendment and constituted an illegal stop. The taint of this illegal stop requires that the subsequent illegal arrest and seizure must be suppressed as fruits of the illegal stop. *Wong Sun v. United States*, 371 U.S. 471 (1963).

B. **The drug courier profile has extremely limited usefulness, if any, in law enforcement but in no case should it be used to warrant more than a mere contact based upon unfounded suspicion.**

There are two major issues which this Court must address when considering the use of the so-called drug courier profile. The first issue is whether the drug courier profile should be approved by this Court to be utilized in any formal way by narcotics officers. Such an endorsement could have further dangerous ramifications with regard to the use of criminal "profiles" for other offenses. The second issue arises if the Court decides that the drug courier profile should not be disregarded entirely. The question then remains, to what degree the profile should be used; i.e., does compliance constitute unfounded suspicion, articulable suspicion, or does it amount to probable cause?

The Respondent respectfully suggests that a judicial endorsement of the drug courier profile may result in further consequences, severely restrictive of individual freedoms in circumstances other than those presently before the Court. The drug courier profile is no more than a statistical compilation of certain physical characteristics and idiosyncracies. As this Court has already stated in *Reid*, most of these characteristics are completely compatible with innocent behavior. The characteristics allegedly displayed by the Respondent in the instant case include nervousness, close scrutiny of his luggage, use of American Tourister luggage, and payment of an airline ticket in cash. (A. 29, 34, 35). By approving formal use of such a profile, all individuals using American Tourister luggage, looking nervous before departing on a plane, watching their bags carefully

and paying for tickets in cash will be subject to some degree of police intrusion. The extent of this intrusion is the second issue which needs to be considered by the Court.

While it may appear that statistical analyses of known criminals are useful tools in apprehending other suspected criminals, it is important to look more deeply into the consequences of such a theory. If a computer were to analyze the average characteristics of the rapist, pornographer, tax evader, embezzler, corrupt politician, etc., nearly every person in America would fall into one of these characteristic categories. Any endorsement of the use of the drug courier profile would encourage further profiles for virtually every conceivable criminal offense. The stopping of narcotics traffic is surely not the only crime problem facing America. But the widespread use of criminal profiles would subject nearly every American to police intrusion due to one's displaying of wholly innocent behavior.

The Respondent does not suggest that trained police officers should ignore their own experience. However, the approval of a statistical checklist fitting the "average" drug smuggler could actually impede the free use of a narcotics officer's experience and could also result in the ignoring of drug smugglers not fitting into the "typical" drug courier mold. Further, undue emphasis on statistical compilation of "average" criminal behavior could have widespread and severely restrictive ramifications for all Americans. Police intrusions based upon computer determined probabilities have tremendous potential for abuse and selective enforcement. We have no way of knowing the present extent to which the constitutional rights of innocent

airport travelers are being abused on a daily basis by the use of the profile in the unlawful detaining and/or searching of passengers by narcotics officers in airports across the country.

If, however, this Court were to hold that the drug courier profile does have some place in law enforcement, the next question which must be considered is the degree to which the profile should be utilized. The original panel decision in the instant case, later reversed by a unanimous en banc court, actually held that compliance with the drug courier profile amounted to *probable cause to arrest.* The original panel decision helds as follows:

> *The rationale of the ruling in this case is that when trained officers spot a departing air travel passenger who with his luggage fit the profile of a drug courier carrier, giving them probable cause* to believe the person is transporting contraband, thereby the *officers will have probable cause to arrest* the person without warrant . . . (emphasis added).
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> 389 So.2d at 1012

As set forth above, the original panel decision, without support from any other courts in this country, went so far as to find that compliance with certain aspects of the drug courier profile subjected an individual to actual arrest. This would be one of the most extreme intrusions upon one's personal freedom and one which must surely be rejected by this Court, as it was by the unanimous en banc Florida appellate court.

Not only should the finding of probable cause based upon compliance with a drug courier profile be rejected by the Court, but in addition, Respondent submits that drug courier characteristics are also insufficient to establish reasonable suspicion for an investigative stop as has already been held in the *Reid* case. In the brief for the United States, it is stated that the use of a drug courier profile to find reasonable suspicion of criminal activity is not inconsistent with the *Reid* decision. (Brief for United States at 30). Respondent submits, however, that the characteristics demonstrated in the instant case are certainly no more indicative of criminal behavior than those in *Reid* which the court found "too slender a reed" to support an investigative seizure. As set forth in more detail in the foregoing, it is clear that no meaningful distinction can be made between the characteristics this Court felt were insufficient to justify an investigative stop in *Reid* and those demonstrated by the Respondent below. (See Brief for Respondent at 11-12).

It is the Respondent's position that if the profile is approved by this Court to be utilized in any manner, it must be used only to establish the lowest degree of "suspicion," allowing an officer to make an initial contact only. This contact is the least intrusive encounter a police officer can make and at this level of contact, confrontation is entirely dependent upon the suspect's voluntary cooperation. When making such a contact, the officer can identify himself, but cannot demand anything nor can he seize or detain a suspect even

temporarily.[3] If the drug courier profile is approved by this Court in any manner, it should be approved to reach the degree of intrusion required for a mere "contact" only.

II.

EVEN IF THE INITIAL CONFRONTATION AND STOP WAS NOT UNLAWFUL, SUBSEQUENT ACTIONS OF THE NARCOTICS OFFICERS DEMONSTRATE THAT THE RESPONDENT WAS ARRESTED IN VIOLATION OF THE FOURTH AMENDMENT WHERE THERE WAS NO SHOWING OF PROBABLE CAUSE PRIOR TO THE SEARCH OF RESPONDENT'S BAG.

A. Each of several actions of the narcotics officers sufficiently restrained the freedom of the Respondent to amount to an arrest, absent probable cause.

Although each of several actions of the narcotics officers subsequent to the initial confrontation with the Respondent would individually constitute a basis

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[3]The DEA "Handbook" prepared by the Justice Department states that even a "contact" requires "some suspicion of criminal activity." It further states that:

> A DEA agent, unlike a Customs Inspector, cannot make airport "contacts" on a random basis. Nor should a "contact" be made solely on a mere hunch. Since the majority of airline passengers are legitimate travelers, such a practice would not be received favorably by the courts.

"Legal Problems in Airport Interception of Domestic Drug Couriers," p.125.

for finding that the Respondent was arrested, collectively there can scarcely be a more classic case for the finding of an arrest than the instant circumstances. The Florida Appellate Court stated that the case presented an "almost classic definition of imprisonment." 389 So.2d at 1018.

First of all, the officers identified themselves to the Respondent as narcotics officers and stated that they suspected him of transporting narcotics. (A. 44). As a result, it is clear that the investigation was focused on the Respondent and his ability to simply walk away from the encounter is already in question.

Secondly, the officers took both Respondent's ticket and baggage stubs and retrieved his luggage for him. (A. 65, 66). The ticket and luggage were never returned nor offered to him and one of the officers admitted that the Respondent could not leave without at least his ticket. (A. 67, 71, 80).

Respondent was then taken to an interrogation room without the ticket or bags in his possession. On the way to the room, one of the officers told the Respondent that they had been waiting all morning for him and asked how much pot was in the bags. (A. 84).

Upon the occurrence of any one of these circumstances, a reasonable person would objectively conclude that he was not free to leave and, as a result, an arrest occurred. *United States v. Mendenhall*, 446 U.S. 544, 554 (1980).

Upon the initial confrontation and detention by the officers, the Respondent was told he was speaking

to narcotics officers who "had reason to suspect he was transporting narcotics." (R. 26). The courts have held that one of the most compelling factors in determining whether a "seizure" has occurred is whether the focus of the investigation has centered on an individual. *Brown v. Beto*, 468 F.2d 1284 (5th Cir. 1972); *United States v. Phelps*, 443 F.2d 246 (5th Cir. 1971).[4] By advising

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[4]In *Phelps, supra*, at 247-248, the Fifth Circuit noted that:

> . . . throughout the decisions one of these factors has consistently impressed our court: whether or not the focus of the investigation has finally centered on the defendant. In *Miranda* itself the Supreme Court explained that "in custody" was a short-hand phrase for what *Escobedo v. Illinois*, 1964, 378 U.S. 478, 490, 84 S.Ct. 1758, 12 L.Ed.2d 977, described as an investigation which has focused on an accused. Similarly, in *Windsor v. United States, supra*, 389 F.2d at 533, we held that *Miranda* was applicable since
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> > "The obvious purpose of the agents interrogating him was to elicit an incriminating statement for 'the investigation was no longer a general inquiry into an unsolved crime' but has begun 'to focus on a particular suspect' namely, Windsor."

In *Bendelow v. United States*, 5 Cir. 1969, 418 F.2d 42, 47, we said:

> "We agree with the trial judge that after Hart (the police officer) discovered the alterations in the license the investigation focused upon Bendelow and a *Miranda* warning was in order before any statement by Bendelow would be admissible."

See also, United States v. Montos, supra, 421 F.2d at 223, where we held that the defendant had not been subjected to custodial interrogation because the investigation, rather than focusing on the defendant, was still in the general investigatory stage of "screening crime from mishap," and *United States v. Akin*, 5 Cir. 1970, 435 F.2d 1011, where we held that *Miranda* did not apply because the investigation was still at an early non-accusatory stage.

Respondent that he was supected of transporting narcotics, the investigation had centered upon him. Would an individual reasonably believe that he was free to go where narcotics officers confront him, identify themselves, and tell him that he is suspected of transporting narcotics? Respondent submits that the statements made to the Respondent by the narcotics officers alone amount to an unlimited detention and seizure, i.e., an arrest.

Not only did the narcotics officers advise the Respondent that he was suspected of transporting narcotics, but they also took his ticket and baggage stubs, retrieved his luggage for him, and never returned nor offered the ticket or luggage to him again. (A. 65, 66, 69, 71, 81). Although the narcotics officers seized both the Respondent's ticket and baggage, either seizure was sufficient to also constitute an arrest of the Respondent. As this Court stated in *Mendenhall*, where the Respondent was not found to be seized, ". . . *her ticket and identification were returned to her* before she was asked to accompany the officers." 446 U.S. at 558 (emphasis added).[5] In the instant case, the narcotics officer testified that the ticket was never offered nor

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[5]It should be noted that in the "Handbook" prepared by the Justice Department for DEA agents, agents are clearly instructed:

> Return ticket and/or ID *immediately.* Unless you quickly return the ticket and/or ID to the suspect, the defense attorney may be successful in arguing that his client was not free to leave at this point, since you were holding his travel papers.

"Legal Problems in Airport Interceptions of Domestic Drug Couriers," p. 129. (emphasis in original).

returned to the Respondent and the officer further admitted that the Respondent could not leave without it. (A. 68.) The ticket remained in the interrogation room while the baggage was retrieved. (A. 71).

Additionally, either the seizure of the baggage stubs or the actual baggage constituted an arrest of the Respondent. In *United States v. McCain*, 556 F.2d 253, 255 (5th Cir. 1977), the defendant was in a supervisor's room while her bag was being held, and since she was

> . . . able to leave only if she was willing to abandon her luggage, . . . this itself is a sufficient restriction on one's freedom of action so as to trigger the giving of *Miranda* warnings. . . .

The seizure of a suspect's baggage goes ". . . far beyond a mere investigative stop and amount[s] to a violation of his Fourth Amendment rights." *United States v. Place*, 660 F.2d 44, 50 (2d Cir. 1981). The failure of the narcotics officers to return or offer to return the Respondent's baggage stubs or luggage unquestionably resulted in a seizure of the Respondent requiring probable cause. Since he was unable to leave without his baggage, his freedom was clearly restricted.

The factual circumstances regarding the obtaining and retention of the Respondent's luggage by the officers clearly demonstrate the severe restriction of the Respondent's freedom. While one officer "took" the Respondent to the interrogation room, the other officer went downstairs to get the bags. (A. 66). There was absolutely no evidence that the Respondent consented to the retrieval of his luggage by the officer. The narcotics officer watched the Respondent and stayed with him in

the room while the other officer was picking up the suitcases. (A. 67, 70). The Respondent was never told he could leave the room (A. 72) and indeed no reasonably minded person would believe that he could leave even without his ticket or baggage. The actions of the officers went far beyond the parameters of an investigative stop.

The taking of the Respondent to an interrogation room, the activities of the narcotics officers on the way to and inside the room, as well as the physical make-up of the room, also demonstrate that the Respondent was not free to go and was, in fact, seized. An investigative stop, as opposed to a seizure, should be limited to the locale in which the suspect was found and/or baggage located. *Terry, supra.* Where a suspect has been removed from the initial location of contact to another place, even briefly, it has been held to be an illegal seizure. *Dunaway v. New York*, 442 U.S. 200 (1979); *United States v. McCaleb*, 552 F.2d 717 (6th Cir. 1977) (taking suspects to private office held to be an arrest). As in *Dunaway*, the officers in the instant case made use of an interrogation room and failed to tell the Respondent that he was free to go. (R. 43). Additionally, as in *Dunaway*, the Respondent would not have been allowed to depart had he attempted to do so. *The State conceded this point at oral argument. See Royer v. State*, 389 So.2d 1007, 1018 (Fla.3d DCA 1980).

Pursuant to the officers' request, the Respondent accompanied them to an interrogation room because as the Respondent stated: ". . . they were police officers and I felt that that's what I had to do." (A. 79). The Respondent did not believe that he had a right to leave at that time (A. 82), or later in the interrogation room.

(A. 84). Given the totality of the circumstances, the Respondent's subjective reactions were reasonable and understandable. On the way to the interrogation room, the Respondent stated that one officer said that they had been waiting for him all morning and asked how much pot was in the bags. (A. 84). This same officer told the Respondent that he "must be crazy to try to do this because there were always guards around." (A. 84). While he was in the room, the Respondent neither had access to his ticket nor his bags. He had previously been told that he was suspected of transporting narcotics and was also told that the officers had been waiting for him all morning. It is simply inconceivable that an individual given these circumstances could have reasonably believed that he was free to go. Therefore, the Respondent was effectively arrested.

The physical make-up of the room and the absence of other individuals contributed to the coercive atmosphere and the belief by the Respondent that he could not leave. The interrogation room was actually a converted closet. (A. 45). The only persons in the room were two narcotics officers and the Respondent. (A. 70). The Respondent had access to neither his ticket nor his baggage. If one adds the fact that the Respondent had already been told he was suspected of transporting narcotics, it is absurd to believe that the Respondent could have believed that he was free to leave the room at any time.

Although it may be difficult, if not impossible, to pinpoint the exact "magical moment" at which the Respondent was seized by the police, it is not necessary to make this determination. The totality of the circumstances clearly indicate that at some point prior

to the search of the Respondent's suitcases, he was unconditionally seized, restrained, and arrested by the narcotics officers. Although there is case law holding that (1) accusatory statements made by the narcotics officers to the Respondent, (2) the seizure of the ticket, (3) the seizure of the baggage stubs and baggage or the (4) taking of the Respondent to an interrogation room; can each result in the arrest of an individual, the combination of these circumstances certainly demonstrate that at some point prior to the search, a seizure occurred. It is not necessary to determine the exact moment the Respondent was seized as long as the totality of the circumstances demonstrate that an unconditional seizure took place at some time prior to the search of the luggage.

B. Even by singling out certain aspects of the entire episode, neither the Petitioner nor the United States can effectively excuse the actions of the narcotics officers who arrested the Respondent without probable cause.

The Petitioner places unwarranted emphasis upon the officers' discovery that the Respondent's identification contained a different name than that on his airline ticket or luggage. Although such a discrepancy may arguably be suspicious, the Respondent's explanation for the difference in the names was reasonable and sufficient to allay any suspicions or fears the officers might have felt. When asked why he was not travelling under the name appearing on his driver's license, the Respondent replied that a friend had made the reservations for him in a different name. (A. 43, 82). Additionally, the fact that the identification tag affixed to his baggage contained the same name as his airline

ticket is not indicative of suspicious behavior in view of the Respondent's reply. It is logical and reasonable to use the same name on baggage as that in which the ticket was reserved and written. If bags were lost, the name on the bags could be much more easily traced to the name recorded for the ticket than to the name of the individual actually using the ticket.

The Respondent's explanation is in sharp contrast to the *Mendenhall* case where the defendant, when asked why the ticket bore a name different than her own, responded that she "just felt like using that name." 446 U.S. 544, 548. The Respondent in the instant case, however, gave an immediate, logical and consistent explanation for the discrepancy.

In its brief, the United States unconvincingly attempts to minimize the officers' retention of the Respondent's luggage and tickets by pointing to the "brevity" of the detention. The period of time in which the Respondent's ticket and luggage were detained is only one small factor among the totality and general tenor of the entire episode from which the question of whether an arrest occurred should be determined. For example, the placing of handcuffs on an individual takes a matter of seconds, but it is quite clear that the individual's freedom is sufficiently restrained to constitute an arrest. The actions of the officers and the reasonable perception of the Respondent are more important than the number of minutes involved in the instant confrontation. A mere conversation with the Respondent in the concourse might arguably be no more than a brief detention permissible if reasonable suspicion was present. However, the retention of the Respondent's ticket and luggage as well as the taking of the Respondent

to an interrogation room are clearly more significant than the fact that the entire episode may have encompassed no more than fifteen minutes. (A. 50). Such circumstances amounted to an arrest and seizure of the Respondent notwithstanding the time element. A *Terry* stop is one which is temporary and limited. The above-stated circumstances demonstrate that the actions of the instant officers were certainly not limited nor brief.

C. The Respondent did not consent to the search or seizure and any alleged consent is presumed invalid as the product of an illegal arrest.

The United States also claims, without factual or legal basis, that "there is no reason to conclude that Respondent's consent to search was a product of the retrieval of his luggage." (Brief for the United States at 16). First of all, the testimony regarding the alleged consent is extremely equivocal. While in the interrogation room with the two narcotics officers, one of the officers testified that he told Respondent "We would like him to open the suitcases." (A. 47). The officer testified when asked what the Respondent said at that time, "He was extremely nervous about it and *he didn't say anything specifically that I can recall.*" (emphasis added). (A. 47, 48). Although the officer later testified that the Respondent silently produced a key out of his pocket, it is highly questionable whether such an action, even in a light most favorable to the State, constituted a free, unequivocal and uncoerced consent to search the suitcases.

Secondly, the contention of the United States with regard to the lack of basis for the conclusion that the

Respondent's consent to search was a "product" of the officers retaining his luggage is irrelevant and without legal import. The law maintains that a consent is *presumed* invalid unless an attenuation dispels the taint of an illegal arrest. *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973); *Bumper v. North Carolina*, 391 U.S. 543 (1968); *See also Johnson v. Zerbst*, 304 U.S. 458 (1938) (presumption against waiver of constitutional rights). Therefore, it is the *State's burden* to demonstrate that *any alleged consent is not a product* of the illegal arrest rather than the Respondent's burden to demonstrate that it was. In the instant case, the alleged consent was secured while Respondent's ticket and luggage were being detained by the officers. As a result, there was certainly no attenuation or intervening circumstances between the illegal arrest and the alleged consent. Lastly, there could never be direct evidence that an alleged consent was the proximate result of illegal actions other than an individual's subjective statement that he consented because of the prior illegal activities of the police officers. The instant Respondent clearly testified that he did not give the officers permission to take or search his suitcases, and that he did what they asked because he felt he was compelled by the officers' actions to do so. (A. 82, 83, 86).

D. The absence of probable cause for the arrest of the Respondent is as equally apparent as is the existence of an arrest.

Not only is the presence of an arrest clearly indicated by the facts of the case, but the lack of probable cause to effectuate such an arrest is also obvious. The only basis for the detention of the Respondent was his compliance with some of the characteristics of a drug

courier profile. There is absolutely no legal basis to conclude that mere similarities with certain seemingly innocuous characteristics of a drug courier profile amount to probable cause to arrest. However, in the instant case the arresting officer unequivocally admitted in the trial Court that *no probable cause existed prior to the actual discovery of the contents of the baggage.* (A. 57). Additionally, neither the brief for the Petitioner nor the United States specifically maintains that probable cause was present. Both the Petitioner and the United States assert that no arrest occurred, and that the intrusion of the officers with regard to the freedom of the Respondent was minimal and reasonable under the circumstances.

The crux of this issue on appeal is whether the Respondent was seized by the narcotics officers and if so, was there a reasonable basis for the seizure. If in fact this Court finds that the Respondent was unconditionally seized (arrested), this Court must also find that such seizure was without probable cause, and therefore illegal and violative of the Fourth Amendment. Secondarily, the Respondent submits that even if this Court finds that only a limited detention occurred, this too was illegal due to the absence of a well-founded suspicion that criminal activity was afoot.

III.

THE STATE FAILED TO TIMELY RAISE ITS CLAIM FOR A GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE. ADDITIONALLY, SUCH AN EXCEPTION IS NOT PERMISSABLE UNDER THE INSTANT FACTS AND SHOULD NOT BE ADOPTED IN ANY CASE.

A. The Petitioner is precluded from asserting a "good faith exception" to the exclusionary rule on appeal to the Supreme Court where the issue was never raised below and was therefore waived by the Petitioner.

Section 1 of the Petitioner's brief is a frontal attack on the exclusionary rule and an attempt to carve out a "good faith exception." However, it is a basic tenet of appellate jurisprudence that an appellant is precluded from raising points on appeal to a higher Court where such points were not first raised below. *Graham v. Brotherhood of Locomotive Firemen & Enginemen*, 338 U.S. 232 (1949); *Bonded Transportation, Inc. v. Lee*, 336 So.2d 1132 (Fla. 1976). In the instant case, the Petitioner at no time challenged the existence or propriety of the exclusionary rule. As a result, the Petitioner has waived any claim or right he might have had to make such an argument before the Court at this time.

The failure of the Petitioner to raise this argument below prevented the state courts from having an opportunity to consider the argument or to make a determination with regard to it. The state courts were

never given a chance to address this issue nor to hear argument of counsel.

B. None of the factors cited by the *Williams* court in favor of a "good faith exception" are present in the instant case.

In its haste to urge this Court to adopt a good faith exception to the exclusionary rule, Petitioner ignores both the facts of the instant case and the factors set forth in *United States v. Williams*, 622 F.2d 830 (5th Cir. 1980), an opinion upon which the State relies. *Williams* held that evidence seized pursuant to an unlawful arrest is admissible at trial when the officer making the arrest acted in good faith and with the reasonable, though mistaken, belief that he was so authorized to make the arrest.[6]

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[6]It should be noted at this juncture that there were two majority holdings in *U.S. v. Williams*. The proposition for which *Williams, supra*, is cited for in the text is the holding embodied in Part II of the opinion. The Part I opinion reversed the suppression of the evidence by the District Court on the grounds that the agent was authorized by statute to arrest the defendant. The first majority held that violation of the defendant's bond restriction constituted criminal contempt under 18 U.S.C. §401(3) (1976) and that, therefore, the agent was empowered to arrest the defendant under 21 U.S.C. §868(3) (1976). Thus, the first majority reasoned, the evidence was obtained by a search incident to a lawful arrest.

The Part II majority did not concur in this interpretation of the aforementioned statutes, instead finding the evidence involved was admissible regardless of whether the officer had authority to arrest insofar as the officer reasonably and in good faith believed that he possessed the necessary authority to make the arrest. Hence, the good faith exception.

The good faith exception carved out by the *Williams* court contains two facets, neither of which are applicable to the instant case.

The first, which the court termed the "technical violation facet," occurs when law enforcement officials rely, in good faith, on a statute that is later declared unconstitutional, an interpretation of a statute that is later construed differently, or a warrant that is later declared invalid. *See also Brown v. Illinois*, 422 U.S. 590, 610-612 (1975) (Powell, J., *concurring*). It does not appear of record, nor does Petitioner anywhere contend, that any such circumstances are present in the instant case. Therefore, a good faith exception cannot be advanced under this rationale.

The second facet of the good faith exception under *Williams* applies when an officer makes a judgmental error concerning the existence of facts sufficient to consitute probable cause. This, the court termed, the "good faith mistake facet." However, it is equally clear that this facet has no application to the instant case. As noted above, this facet deals with the situation where an officer mistakenly believes that certain facts give rise to probable cause. However, in the case at bar, *the arresting officer admitted that he had no probable cause to arrest prior to the actual search of the baggage.* (A. 57). Never did he maintain that he mistakenly believed there was probable cause to search. The court in *Williams* warned of this exact situation:

> *Exclusion of evidence seized without any probable cause is an entirely different question* from suppression of evidence seized upon a

good faith and reasonable belief in the existence of probable cause. (emphasis added).

622 F.2d at 846

Any argument for adoption of a good faith exception to the exclusionary rule should at least be limited to that situation which would warrant its application. Adopting such an exception in the instant case, where admittedly no probable cause to stop or search was present, can only portend substantial evisceration of the Fourth Amendment. The touchstone of the Fourth Amendment's protection of privacy interests and prohibition against unreasonable police searches and seizures is the requirement that such police intrusions be based upon probable cause. *Michigan v. DeFillipio*, 443 U.S. 31, 43 (1979). Accordingly, the State's attempt to urge a good faith exception to the exclusionary rule must fail in this case, even under the authority the State cites in its support.

C. This Court should not adopt a good faith exception to the exclusionary rule under any circumstances.

It has been stated, and Respondent submits, that the *Williams* court overshot its mark in carving out the good faith mistake exception to the exclusionary rule. *See Williams, supra*, at 848, (Rubin, J., *specially concurring*); Comment, *Constitutional Law: The Fifth Circuit's "Good Faith" Exception to the Exclusionary Rule—Well-Reached or Overreached?*, 33 U. FLA. L. REV. 300 (1981). While adequate authority existed for the court's adoption of the technical violation facet of

the exception,[7] a concomitant dearth of direct precedent existed for the good faith mistake facet. In fact, the four cases cited in support of this facet all contain aspects of the technical violation facet and not an officer's own mistaken perception of probable cause. In *United States v. Janis*, 428 U.S. 433 (1976) this Court refused to exclude evidence that had been obtained by police in good-faith reliance on a search warrant later found defective. Similarly, in *United States v. Hill*, 500 F.2d 315 (5th Cir. 1974), *cert. denied*, 420 U.S. 931 (1975), the Fifth Circuit admitted evidence obtained in a search although the warrant was technically improper. In *Michigan v. Tucker*, 417 U.S. 433 (1974), this Court refused to exclude evidence obtained from an accused who was given only a partial *Miranda*-type warning

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[7]The Fifth Circuit relied upon the following cases in support of the technical violation facet: *United States v. Peltier*, 422 U.S. 531 (1975) (evidence seized in a good-faith border search without a warrant under a statutory construction that was subsequently held unconstitutional held admissible); *Michigan v. DeFillipio*, 443 U.S. 31 (1979) (evidence seized pursuant to a good faith arrest with probable cause for violation of a law later declared unconstitutional held admissible); *United States v. Cardena*, 529 F.2d 443 (5th Cir. 1976) *cert. denied*, 429 U.S. 848 (1976), *modified on other grounds sub nom. United States v. Ashley*, 569 F.2d 975, 979 (5th Cir.) *cert. denied*, 439 U.S. 853 (1978) (evidence seized pursuant to an arrest and search made in good faith under a statute later declared invalid held admissible); *United States v. Kilgen*, 445 F.2d 287 (5th Cir. 1971) (confession obtained pursuant to a good faith arrest under a vagrancy ordinance later held invalid was admissible).

In light of the authority supporting the technical violation facet, Respondent does not necessarily quarrel with such an exception. However, Respondent maintains that adoption of this facet of the good faith exception would be manifestly inappropriate in this case insofar as there are absolutely no facts in the case at bar to trigger its application.

during an interrogation which occurred before the *Miranda* decision, although the trial came afterwards.[8] Finally, in *United States v. Wolffs*, 594 F.2d 77 (5th Cir. 1979), the Fifth Circuit refused to exclude evidence, not because the officers mistakenly perceived probable cause, but rather because their violation of the pertinent statute was an isolated act, committed in good faith.

The serious deficiencies of the *Williams* decision and the Fifth Circuit's willingness to adopt a good faith exception under such inauspicious circumstances has led one commentator to remark:

> Had the Part II majority limited its exclusionary rule exception to technical violations, which under the facts of the instant case and supporting authority would have been appropriate, the dangers in this decision might have been avoided. A technical violation, almost by definition, assures that an officer acted in reasonable good faith. The good faith and reasonableness of the officer are objectively demonstrated by his reliance on a statute or other authority. The good faith mistake facet of the exception articulated by the Part II majority, however, does not lend itself to such assurances of reasonableness and good faith. Instead, it creates opportunity for abuse at two levels. First, a law enforcement officer who has knowingly made an unlawful arrest or search may later claim that he was acting

[8]The police complied fully with the mandate of *Escobedo v. Illinois*, 378 U.S. 478 (1964), the controlling precedent at the time the warnings were given. 417 U.S. at 447.

> in good faith. Second, the court deciding such good faith claims has wide discretion in applying the exclusionary rule. The potential for abuse is heightened by the Part II majority's failure to fashion a test for the establishment of reasonable good faith and failure to articulate the burden of proof. (footnotes omitted).
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> Comment, *supra*, at 311.

The State of Florida urges this Court to repeat the error of the Fifth Circuit, while Florida's own appellate courts have repeatedly declined the invitation. *State v. Thomas*, 405 So.2d 462 (Fla.3d DCA 1981); *Moline v. State*, 404 So.2d 826 (Fla.1st DCA 1981); *Lovett v. State*, 403 So.2d 1079 (Fla.1st DCA 1981); *Walden v. State*, 397 So.2d 368 (Fla.1st DCA 1981). While Respondent recognizes and respects this Court's past efforts in modifying the exclusionary rule, Respondent submits that a judicial opinion by this Court allowing the admission at trial of evidence unconstitutionally seized where the seizing officer admits he had no probable cause, will certainly forecast the complete demise of the exclusionary rule.

IV.

ARTICLE I, SECTION 12 OF THE FLORIDA CONSTITUTION IS A CONSTITUTIONALLY INCORPORATED EXCLUSIONARY RULE WHICH AFFORDS MORE PROTECTION THAN THE FOURTH AMENDMENT TO THE FEDERAL CONSTITUTION. AS A RESULT, EVIDENCE SEIZED IN VIOLATION OF ARTICLE I, SECTION 12, IS INADMISSIBLE IN FLORIDA COURTS REGARDLESS OF WHETHER OR NOT THE EVIDENCE IN QUESTION WAS OBTAINED IN VIOLATION OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The keystone of our federal system is the supremacy of the Federal Constitution as embodied in this Court's opinions. Accordingly, state court decisions in conflict with this Court's pronouncements cannot be accorded the force of law. However, it is equally clear that state citizens, through their state constitution, can afford themselves more protection than those protections afforded by the Federal Constitution.[9] The Respondent submits that Article 1, Section 12 of the Florida Constitution imposes a stricter standard upon police conduct than does the Fourth Amendment to the Federal Constitution. Consequently, the state court determination of this state law issue has obviated the need to resolve

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[9]*See generally Pruneyard Shopping Centers v. Robbins*, 447 U.S. 74 (1980); *Cooper v. California*, 386 U.S. 58 (1967); Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977). At least one Member of this Court has applauded this "very healthy trend." *Pruneyard Shopping Centers, supra*, at 91 (Marshall, J., *concurring*).

the federal constitutional issues which constitute the bulk of Petitioner's appeal. Accordingly, this Court should abstain from exercising jurisdiction in this case.

The State of Florida's highest court has repeatedly held that Article I, Section 12, of the Florida Constitution,[10] prohibiting unreasonable searches and seizures, is more restrictive than its federal counterpart contained in the Fourth Amendment to the United States Constitution. *Odom v. State*, 403 So.2d 936 (Fla. 1981); *State v. Sarmiento*, 397 So.2d 643 (Fla. 1981); *Grubbs v. State*, 373 So.2d 905 (Fla. 1979). The reason for Florida's stricter standard is obvious and can be found in the last sentence to Article I, Section 12: "Articles or information obtained in violation of this right shall not be admissible in evidence." Thus, the exclusionary rule in Florida is an express constitutional provision and, unlike the Federal exclusionary rule, not a judicially created remedy intended to deter unreasonable police conduct. "In Florida the exclusionary rule is not merely a judicial construct but is written into the Constitution itself." *Croteau v. State*, 334 So.2d 577, 580-581 (Fla. 1976) (Hatchett, J., *concurring*).

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[10]Article 1, §12, Fla. Const. (1968) provides:

> Searches and seizures.—The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the person or persons, thing or things to be seized, the communication to be intercepted, and the nature of evidence to be obtained. Articles or information obtained in violation of this right shall not be admissible in evidence.

In *Odom, supra*, the Florida Supreme Court found no bar to the introduction of the evidence in question under the United States Constitution. However, the Court found that the admission of the evidence was error under Florida's exclusionary rule. The court remarked:

> Evidence obtained in violation of Article 1, Section 12 is inadmissible in Florida courts. This constitutional principle applies *regardless* of whether the evidence in question was obtained in violation of the Fourth Amendment, and *regardless* of the scope of the Fourth Amendment exclusionary rule. (citations omitted) (emphases added).
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> 403 So.2d at 940

Similarly, in *State v. Sarmiento, supra*, the Florida Supreme Court held that the warrantless electronic monitoring by state agents of a conversation between the accused and an undercover police officer was in violation of Article 1, Section 12. In response to a dissenting Justice who maintained that the Federal Constitution permitted the type of electronic interception found in that case, the majority declared:

> But surely he would concede that *the citizens of Florida, through their state constitution, may provide themselves with more protection from governmental intrusion than that afforded by the United States Constitution.* A fundamental task of the judiciary is to safeguard the constitutional rights of the citizenry. The criminal justice system must protect the rights

> of the innocent as swiftly and as certainly as it punishes the guilty, less it impinge upon the rights of those whom it, with good intentions, seeks to protect. (emphasis added).
>
> 397 So.2d at 645

Finally, in *Grubbs v. State, supra*, the Florida Supreme Court, in the face of ample federal precedent to the contrary,[11] held the exclusionary rule applicable to probation revocation proceedings.

The State's bald contention that the Florida courts would adopt a good faith exception to the Fourth Amendment if given the chance (Brief for Petitioner at 23) flies in the face of over 50 years of Florida constitutional jurisprudence. *See, e.g., Gildrie v. State*, 94 Fla.134, 113 So.704 (1927); *Accord, Taylor v. State*, 355 So.2d 180 (Fla.3d DCA 1978). It matters little that there exists some authority to the effect that the Fourth Amendment exclusionary rule should be modified or abolished, *Stone v. Powell*, 428 U.S. 465 (1976) (Burger, C.J. *concurring*, White, J., *dissenting*); *Bivens v. Six Unknown Narcotics Agents*, 403 U.S. 388 (1971) (Burger, C.J., *dissenting*); *Brown v. Illinois*, 422 U.S. 590 (1975) (Powell, J., *concurring*), for it is, at best, highly doubtful that any Florida court is constitutionally free to effect such a modification of

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[11] *See, Latta v. Fitzharris*, 521 F.2d 246 (9th Cir.), *cert. denied*, 423 U.S. 897 (1975); *United States v. Farmer*, 512 F.2d 160 (6th Cir.), *cert. denied*, 423 U.S. 987 (1975); *United States ex rel. Lombardino v. Heyd*, 318 F.Supp. 648 (E.D.La. 1970), *aff'd*, 438 F.2d 1027 (5th Cir.), *cert. denied*, 404 U.S. 880 (1971); *United States v. Hill*, 447 F.2d 817 (7th Cir. 1971); *United States ex rel. Sperling v. Fitzpatrick*, 426 F.2d 1161 (2d Cir. 1970).

Florida's exclusionary rule. Consequently, this inability to alter the exclusionary rule, short of constitutional amendment, is reflected in the reluctance of Florida appellate courts in embracing a good faith exception to the exclusionary rule in the aftermath of *United States v. Williams*, 622 F.2d 830 (5th Cir. 1980). *See State v. Thomas*, 405 So.2d 462 (Fla.3d DCA 1981); *Moline v. State*, 404 So.2d 826 (Fla.1st DCA 1981); *Lovett v. State*, 403 So.2d 1079 (Fla.1st DCA 1981); *Walden v. State*, 397 So.2d 368 (Fla.1st DCA 1981).

More fundamentally, however, this Court is presented with the identical problem as in *South Dakota v. Opperman*, 428 U.S. 364 (1976). In *Opperman, supra*, this Court held that contraband used to convict the defendant had been seized pursuant to an inventory search which was not violative of the Fourth Amendment to the United States Constitution. On remand, the Supreme Court of South Dakota held that the inventory search was unreasonable under their state constitutional provision, even though, admittedly, the language of that provision is almost identical to that found in the Fourth Amendment.[12] *State v. Opperman*, 247 N.W. 2d

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[12]S.D. Const., Art. VI, §11 provides: "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated, and no warrant shall issue but upon probable cause supported by affidavit, particularly describing the place to be searched and the person or thing to be seized."

U.S. Const. Amend. 4 provides: "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, the persons or things to be seized."

673 (S.D. 1976). Thus, this Court decided a federal constitutional issue where there were independent and adequate state grounds for resolution of the case. Understandably, the similarity between the language of the two provisions gave little indication that a different result under the South Dakota constitution would obtain. However, this is not so in the instant case.

As previously demonstrated, the Florida Supreme Court has repeatedly held that Article I, Section 12 of the Florida Constitution imposes a stricter standard on police conduct than does the Fourth Amendment. Moreover, Florida's exclusionary rule is constitutionally required, and not judicially created. It follows inescapably that, should this Court modify the federal exclusionary rule so as to admit into evidence the contraband in question, the Florida Supreme Court, on remand, would be constitutionally obligated under Florida's exclusionary rule to suppress the evidence. Thus, contrary to this Court's long-standing aversion to deciding constitutional issues unnecessarily, a constitutional decision will be reached where the need to reach such a decision is not present. Accordingly, this Court should decline jurisdiction in this case.

V.

THE STATE'S FAILURE TO SECURE A STAY PENDING REVIEW OF THE DISTRICT COURT'S EN BANC DECISION HAS RESULTED IN RESPONDENT'S LAWFUL DISCHARGE FROM CUSTODY THUS RENDERING MOOT THE ISSUES PETITIONER RAISES.

On September 9, 1980, the opinion of the Third District Court of Appeal was filed in the instant case. After the State of Florida's Motion for Stay was denied, the mandate was issued. Subsequent to the mandate, and upon motion by the Respondent, the trial court ordered the discharge of the Respondent (R.A. 1).

No appeal from this Order of Discharge was ever perfected. The Respondent submits that this failure to secure a stay has mooted the issues Petitioner raises in this appeal because Respondent's freedom has been fully restored pursuant to the Order of Discharge and therefore, any re-prosecution of the Respondent would run afoul of double jeopardy. As a result, a decision by this Court holding the stop, arrest and search to be constitutional and, therefore, the evidence admissible, would be ineffectual in that a second prosecution for the same offense would be barred.

The State of Florida is obligated to secure an order staying proceedings in the trial court during the pendency of the State's appeal. *State v. Villavicencio*, 381 So.2d 256 (Fla.4th DCA 1980); Rule 9.140(c)(2), Florida Rules of Appellate Procedure (1978). The failure to

secure such a stay results in the trial court's Order of Discharge being affirmed. *Villavicencio, supra,* at 257.

The facts of *Villavicencio* are strikingly similar to those of the case at bar. In that case, the State of Florida appealed from an order of the trial court discharging the defendants under the provisions of Florida's speedy trial rule. At issue was whether the State was obligated to secure an order staying proceedings in the trial court during the pendency of the State's appeal of an order granting a motion to suppress. The court held that the state was obligated to secure such an order under the express provisions of Rule 9.140(c)(2). The court stated:

> With the adoption of Rule 9.140(c)(2), we now believe that the Supreme Court [of Florida] has resolved any doubts as to the necessity of such an order.
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> 381 So.2d at 257

Rule 9.140(c)(2) does not equivocate: "An appeal by the State shall stay further proceedings in the lower tribunal *only* by order of the lower tribunal." (emphasis added). Although the Appellate Rules provide for an automatic stay in certain instances, criminal cases are expressly excluded. *See e.g.,* Fla.R.App.P. 9.300(b)(2), ("The timely filing of a notice [of appeal] shall automatically operate as a stay pending review, *except in criminal cases,* when the State . . . seeks review.") (emphasis added). The failure of the Petitioner to secure a stay of the Third District Court of Appeals en banc decision can only result in affirmation of the trial court's Order of Discharge. Such failure to secure a stay pending

review has so altered the posture of the controversy and mooted the issues as to make further judicial response ineffective and inconsequential. Accordingly, this Court should decline to hear this appeal.

CONCLUSION

Based on the foregoing law and argument, Respondent submits that the unanimous en banc Florida appellate court decision should be affirmed.

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RESPONDENT'S APPENDIX I

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

CASE NO. 78-200

CRIMINAL DIVISION

STATE OF FLORIDA,

Plaintiff,

vs.

MARK ROYER,

Defendant.

ORDER

THIS CAUSE came on to be heard upon Defendant, MARK ROYER'S ore tenus Motion for Discharge and Motion for Discharge of Surety, and the Court having heard argument of counsel and being otherwise fully advised in the premises it is hereby

ORDERED AND ADJUDGED:

1. Based on the opinion by the Third District Court of Appeal filed September 9, 1980 in the case of *Mark Royer v. State*, Case No. 78-1050 and the Order denying the State's Motion for Stay filed November 26, 1980, the mandate has issued and the Defendant, MARK ROYER, is hereby discharged.

2. Defendant's Motion for Discharge of Surety be and the same is hereby granted.

DONE AND ORDERED in Chambers at Miami, Dade County, Florida this 16 day of December, 1980.

JUDGE IRA L. DUBITSKY
CIRCUIT COURT JUDGE

COPIES FURNISHED TO:
JOSEPH H. SEROTA, ESQ.
STATE ATTORNEY'S OFFICE
LEONARD SWEELING,
ALLEGHENY MUTUAL CASUALTY COMPANY

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondent's Reply Brief has been mailed this 23rd day of March, 1982, to Calvin L. Fox, Esq., Assistant Attorney General, 401 N.W. 2nd Avenue, Suite 820, Miami, FL 33128.

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